86-1002

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD NEWELL and LEDALIA NEWELL,
his wife,

Petitioners

v.

THE MARITIME ADMINISTRATION, THE
UNITED STATES OF AMERICA,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Feres Doctrine should be applied to a reservist when the offending agent of plaintiff's injuries is a civilian agency of the U.S. Government.

Whether the Feres Doctrine evolved from the Federal Tort Claims Act should be extended to a suit brought under The Suits in Admiralty Act and The Public Vessels Act.

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OPINIONS BELOW

The Petitioners, Donald Newell and Ledalia Newell, his wife, respectfully

prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 15, 1986. The opinion of the Court of Appeals for the Third Circuit is not reported. The opinion appears in the Appendix hereto. The opinion rendered by the Eastern District of Pennsylvania is not reported. The opinion appears in the Appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered on September 15, 1986. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C.

Section 1254(1).

STATUTORY PROVISION INVOLVED

46 U.S.C. §741 (Suits in Admiralty Act) provides: No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter [after Mar. 9, 1920], in view of the provision herein made for a libel in personam be subject to arrest or seizure by judicial process in the United States or its possessions: Provided, That this Act [46 USCS §§ 741

et seq.] shall not apply to the Panama Railroad Company.

46 U.S.C. §781 (Public Vessels Act) provides: A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1920.

STATEMENT OF THE CASE

The husband/petitioner, Donald L. Newell, was a member of the United States Naval Reserve as a Bosun Mate First Class. On May 13, 1983, he was ordered to the United States Naval Station at Philadelphia, Pennsylvania for two days beginning May 14, 1983 for inactive duty for training. (14a) The training duty was to be aboard the S/S SCAN, a Maritime Administration Reserve Fleet vessel, which was then at the Philadelphia Naval Base. The S/S SCAN was at that time an inactive vessel maintained afloat at a wharf within the Philadelphia Navy Yard. The S/S SCAN was built as one of a class of five at Sun Shipbuilding during 1960 and 1961. The ship was custom built as the "MORMACSCAN" for Moore McCormack

Lines and was designed principally by Moore McCormack's own in-house staff of naval architects. On October 6, 1980, the Director of the Office of Ship Operations for the Maritime Administration, hereinafter called MARAD, requested permission to berth up to six ships at the Naval Inactive Ship Maintenance Detachment within the Philadelphia Navy Yard, one of which was the S/S SCAN. The Agreement and the Memorandum of Understanding between the Maritime Administration and the United States Naval Base at Philadelphia, Pennsylvania, provided that the Maritime Administration would retain custody of the S/S SCAN at all times. As a partial compensation for utilizing the wharf space, the Maritime Administration agreed to allow reserve cargo handling

battalions to use the S/S SCAN as a training facility. (24a-25a)

The vessel was equipped with a seventy-five ton capacity heavy lift or jumbo boom at the number three hatch. The ships were somewhat unique in that they were equipped with electro-hydraulic cargo winches which were driven by a constant speed electric motor. Actuating the winch through a hydraulic motor supposedly provided more accurate and precise speed control. In practice, the winches did not work out, they were not as powerful as the conventional electric winches and were a constant maintenance problem. (37a)

A specific problem with the winches was their tendency to creep (gradually roll ahead or back) when in the zero position. Thus an improperly adjusted

winch could gradually lift or slack a load imperceptibly, which an unskilled winch operator might not notice. (37a)

In addition, there was a design defect as to the pad eye at the head of the jumbo boom because the pad eye was not curved to the boom contour for welding. (39a)

The ship was owned and operated by Moore McCormack Lines continuously until about 1980, when she was sold to Maritime Administration for reserve fleet status. During the years that Moore McCormack Lines operated the ship, the jumbo boom was used regularly and often, as heavylift cargos comprised the great bulk of Moore McCormack Lines endeavors.

Vangs were installed by Moore McCormack Lines to guide the jumbo boom back and forth from the ship to the deck. While the vangs take no strain and the

amount of load on them is not effected by the weight being lifted by the booms, they effected the use of the heavy booms by slowing the operation by utilizing a six part wire guy.

Husband/petitioner was injured when the upper boom padeye failed. The metallurgy lab at the Philadelphia Naval Shipyard which examined the padeye after the accident, identified three conditions which contributed to its failure; the first was an existing crack which had not been repaired, the second was a smaller sized weld because the design of the pad eye was such that it was not curved to the boom contour and therefore there was an inadequately sized weld on the boom and third, there was a large amount of slag in the weld.

In the opinion of Captain Cullen, an expert witness who furnished an Affidavit

in response to the Motion for Summary Judgment filed by the Government, there was evidence that at two times since the ship was built, this same padeye had cracked. By reason of the gray paint in the unwelded crack, Captain Cullen opined that the crack had occurred before the ship was sold to the Maritime Administration by Moore McCormack Lines. At the time the vessel was sold to Maritime Administration it had been painted gray. (39a)

It was the opinion of Captain Cullen that the design defect, which was occasioned by the planning and design jointly by the Maritime Administration and Moore McCormack Lines, was a substantial factor in causing the carrying away of the upper padeye which caused the injuries to husband/petitioner (40a). It was also his opinion that this

design defect and the condition of the upper pad eye rendered the vessel unseaworthy at the time that Maritime Administration loaned the vessel to the Department of Navy for training purposes. The condition was susceptible to discovery by inspection and Captain Cullen opined that Maritime Administration was negligent in not ascertaining and correcting the structural and design defect and arranging for a repair or restructure to be pursued before bargaining the training use for berth space. (40a)

As a result of the carrying away of the padeye and the falling of the boom, the husband/petitioner suffered a fracture of the right fibula, multiple rib fractures and compression fractures of the L2 and L5 vertebra. In addition, there were multiple transverse fractures

in that part of the spine ranging from L2 through L5. He also suffered a right pneumohemothorax when the lung was perforated by the fractured ribs.

Wife/petitioner's cause of action is based upon her deprivation of the companionship, services and all the elements of consortium resulting from the injury to her husband.

The four corners of petitioners' Complaint and the Affidavits submitted in Answer to the Motion for Summary Judgment made it clear that no attempt was made to bring the United States Navy to account. The actions of the Navy were not questioned in the instant case. The only question was whether the vessel was an unseaworthy vessel by failure of design and maintenance prior to the time that it was loaned to the Navy in exchange for an opportunity to berth the vessel.

In response to the United States Government's Motion for Summary Judgment Plaintiffs/Petitioners urged the holding in Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985) in which the Eleventh Circuit had refused to apply the Feres Doctrine when a civilian agency, namely the FAA had misguided a Coast Guard Pilot into a mountain.

The trial court granted summary judgment on the basis of Feres v. United States, 340 U.S. 135 (1950). The Court below made no effort to analyze or discuss Johnson v. United States, 749 F.2d 1530 (11th Circ. 1985). It merely noted that the Johnson decision was no longer the law of the Eleventh Circuit. Its comment was that the Johnson decision had been vacated pending En Banc review initiated on a sua sponte reconsideration by the Court. Johnson v. United States,

760 F.2d 244. In fact, the reconsideration was initiated by the United States Government and the Johnson decision was reaffirmed by the Court en banc in 760 F.2d, 244 (11th Cir. 1986) (en banc). This Court granted the United States Government's Petition for Certiorari in Johnson v. United States supra. It is respectfully submitted that it is dispositive of the instant case.

REASON FOR GRANTING THE WRIT

I.

The decision in the instant case is in conflict with the Court of Appeals for the Eleventh Circuit in Johnson v. United States, 749 F.2d, 1530, 1532 to 1535 (11th Cir. 1985) 758 F.2d 660; 760 F.2d 244; 779 F.2d 1492 and Stanley v. United States, 786 F.2d 1490 (11th Cir. 1986) in which this Court has granted Petition for Certiorari as to the extension of the Feres Doctrine to civilian agencies of the United States.

In Johnson v. United States, 749

F.2d 1530, 1532 to 1535 (11th Cir. 1985), 758 F.2d 660; 760 F.2d 24; 779 F.2d 1492, Petition of the United States for Certiorari to the Eleventh Circuit was granted at ____ U.S.____ 107 S.Ct. 59, October 6, 1986, and in Stanley v. United States, 786 F.2d 1490 (11th Cir. 1986), Petition of the United States for Certiorari to the Eleventh Circuit was granted at 55 L.W. 3405, December 9, 1986 (86-393).

The Feres doctrine is discussed at length in Johnson v. United States, 749 F.2d, 1530, 1532 to 1535 (11th Circ. 1985). As the Court in Johnson analyzed Feres, the basis of the holding of the United States Supreme Court in Feres was: (1) the absence of parallel private liability; (2) the belief that since

state law must be consulted under the Federal Tort Claims Act, it would be irrational to leave servicemen injured by others in the military dependent upon geographic considerations over which they had no control; (3) the distinctively federal character of the relationship between the United States and those in the military and (4) the availability of a no-fault compensation system. Johnson v. United States, supra, at page 1533.

The peculiar and distinctively federal character of the relationship between the United States and those in the military, or put another way, the peculiar and special relationship of a soldier to his superior and the effects of the maintenance of such suits on discipline, is clearly inapplicable in the instant case. The lawsuit in this

case has nothing to do with Newell's duties in the Navy. Plaintiffs' Complaint attributes his injury to a design defect in which the vessel was designed in such a way as to place all but the most experienced gear handlers at risk. The owner of the vessel was a branch of the United States Government charged with the duty of promoting a Merchant Marine fleet for reasons of commerce and national defense. It is only a coincidence that the vessel was loaned to the Navy under circumstances in which The Maritime Administration benefited because they were thereby afforded a berthing for the S/S SCAN. The Navy, in exchange for affording a berthing to the Maritime Administration, had the opportunity to train seamen in longshoring by utilizing the hoisting gear of the vessel.

At the same time that mutual benefits may have ensued, the Maritime Administration knew or should have known when the vessel was turned over to the Navy that the defective design and the failure to make necessary changes had resulted in a literal trap being turned over to the United States Navy in exchange for the berthing of the vessel.

While this is a cause of action based upon the unseaworthiness of the vessel at the time in which it was made available to the Navy in exchange for a berth, it is also the negligence of The Maritime Administration which is the gravamen of the Complaint. Newell, although he was not a member of the crew of the S/S SCAN, may still be entitled to

the warranty of seaworthiness.[1] Under the circumstances of this case, the Maritime Administration as a civil branch of the United States Government and a ship owner of a vessel designed to be active in the Merchant Marine, had an affirmative duty to correct the defects of the vessel or at a minimum, to warn

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[1] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 98 L.Ed.1099, 66 S.Ct. 872 (1946), established a shipowner's duty to furnish a seaworthy vessel arising out of the relationship of the shipowner to those who come aboard the vessel to perform those services formerly rendered by the crew. The longshoremen were held, among others, to be such workers. In 1972, the Longshoremen and Harborworkers Act, 33 U.S.C. 901 et seq. was amended at §905(b). The warranty of seaworthiness was removed from those persons who come within the scope and purview of the aforementioned act. However, post-1972 amendment longshoremen not covered by 33 U.S.C. 905(b) are still entitled to the warranty of seaworthiness. Aparicio v. Swan Lake, C.A. Canal Zone 1981, 643 F.2d 1109; Castorina v. Lykes Bros. S.S. Co., Inc., D.C.Tex. 1984, 578 F.Supp. 1153; and Pinto v. Vessel Santa Isabel, D.C. Canal Zone 1980, 492 F.Supp. 689.

the United States Navy of the hazards. The factors creating the unseaworthiness long antedated any naval activity.

As to the payments paid under the Veterans Benefit Act, it is recognized that the statutory benefit scheme of the Veterans Benefits Act, 38 U.S.C. 313 concededly are less than the damages in a successful lawsuit. The lesser benefits as diminished are supposedly reasonably assured. 38 U.S.C §§313, 333 (presumptions in favor of service relatedness of disabilities) See, concurring opinion of Circuit Judge Adams in Jaffee v. United States, 663 F.2d, 1226, 1244 (3rd Circ. 1981). The concurring opinion of Judge Adams as to exclusivity of the Veterans Benefits Act was sharply criticized by Circuit Judge Gibbons in his dissent at 663 F.2d at 1263, 1264.

The government wears two hats; that portion of the government which wears the hat of shipowner should be in a parallel position of the similar styled hydra as described in Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 1975, CA3 Pa), cert. den. 423 U.S. 1054, 46 L.Ed. 2d 643, 96 S.Ct. 785, and Reed v. SS Yaka, 373 U.S. 410, 10 L.Ed. 2d 448, 83 S.Ct.1349, 1963 AMC 1373 (1963) reh den 375 U.S. 872, 11 L. Ed. 2d 101, 84 S.Ct. 27. In these cases, the defendant was both a shipowner and a stevedore. There was a refusal to apply the exclusivity clause of the Longshoremen and Harborworkers Act.

The factual situation in Johnson v. United States of America, 749 F.2d 1530 (11th Cir. 1985), closely parallels the instant case. Johnson involved a lawsuit brought against the United States under

the Federal Tort Claims Act by the widow of a helicopter pilot for the United States Coast Guard alleging that the pilot died as the result of negligence on the part of the civilian Federal Aviation Administration Air Traffic Controllers, who had assumed positive radar control over the helicopter because inclement weather made visual navigation impossible. Unfortunately, the helicopter was vectored into the side of a mountain and Johnson was killed in the crash.

The Government filed a Motion to Dismiss arguing that since the helicopter pilot's death arose out of or in the course of activity incident to service, he and his personal representative were barred from recovery. In Johnson, the Court deplored Courts acting as automatons as soon as an injury arises

out of activity incident to service. The En Banc Court looked to the latest expression of the United States Supreme Court in Shearer v. United States, in which the United States Supreme Court reversed the Court of Appeals for the Third Circuit, 723 F.2d 1102 (3rd Circ. 1983) Cert. granted _____ U.S., 105 Supr.Ct. 321, 83 L.Ed.2d 259 (1984), U.S._____, 105 Supreme Court _____ , 87 L.Ed. 2d 38 (1985). The En Banc Court quoted the majority opinion that the Feres doctrine cannot be reduced to a few bright-line rubrics; each case must be examined in light of the statute as it has been construed in Feres and subsequent cases. The En Banc Court went on to say:

> " Following this command, we find that the panel opinion has given proper consideration to

> the Feres factors with particular attention to whether or not the claims asserted here will implicate civilian courts in conflicts involving the military structure or military decisions. The claims presented are based solely upon the conduct of civilian employees of the Federal Aviation Administration (a civilian administration within the Department of Transportation) who were not in any way involved in military activities. The fact that the decedent was a helicopter pilot for the United States Coast Guard is not sufficient, standing alone, to activate the Feres preclusion."

In the instant case, Newell's cause of action is based upon the conduct of civilian employees of The Maritime Administration who were not in any way involved in the military activities of Newell in his weekend training duty.

Looking at the opinion of the panel, we find that in Johnson, the panel found that its opinion is buttressed by Hunt v.

United States, 636 F.2d 580 (Court of Appeals for the District of Columbia, 1980) and Brown v. United States, 715 F.2d 463 (9th Circ. 1983). Hunt and Brown were swine flu cases in which the United States Government was a surrogate defendant sitting in by statute for the vaccine manufacturer. These cases helped underline that it is the status of the United States Government, rather than the status of the claimant, that the Courts must look to. It is why Feres, clarified in Shearer v. United States, supra, demands a case-by-case analysis.

The Court of Appeals for the Third Circuit has looked in the main part to Jaffee v. United States, 663 F.2d, 1226, 1244 (3rd Cir. 1981) as the underpinning of their opinion to apply Feres, supra to to the instant case. The factual situation in Jaffee, supra, is echoed in

Stanley v. United States of America, 786 F.2d 1490 (11th Cir. 1986). In Stanley, supra, the Court examined the special factors set forth in Chappell v. Wallace, 462 U.S. at 299, 103 S.Ct. at 2364, 76 L.Ed.2d at 590, and ruled they were not present in Stanley v. United States, supra. In Stanley, supra, a voluntary participant in a chemical warfare program testing appropriate outer garb was instead caused surreptiously to ingest LSD. The special factors of Chappell v. Wallace, supra, included interruption in military discipline or benefits under the Veterans Benefits Act, 38 U.S.C.A. §§ 301-362 (West 1979) (hereinafter called "VBA"). The Court of Appeals for the 11th Circuit in Stanley, supra, rejected the VBA as an exclusive remedy for injuries incurred incident to military service:

> " We do not find, nor has any other court which has addresed this issue found, any expression of congressional intent that the VBA constitute a serviceman's exclusive remedy for injuries incurred incident to military service."

The Court of Appeals for the 11th Circuit argued that this Court's decision in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 672-73, 97 S.Ct. 2054, 2058, 52 L.Ed.2d 665 (1977), was not a binding precedent on the issue of whether the VBA is the exclusive remedy for servicemen injured while acting incident to military service. The Court of Appeals for the 11th Circuit argued:

> "First, that issue was not expressly before the Court in Stencel. The third-party claimant in Stencel merely argued that 'it may be fair to prohibit direct recovery by servicemen under the Act, since they are assured of compensation regardless of

> fault under the Veterans Benefits Act.' Stencel, 431 U.S. at 672, 97 S.Ct. at 2058 (emphasis added). Moreover, as the dissent in Stencel noted, 'the Veterans Benefits Act does not even contain an explicit declaration that it is the exclusive remedy against the Government for a serviceman's injury.' Stencel, 431 U.S. at 675, 97 S.Ct. at 206. (Marshall, J., dissenting)."
> (at page 1497)

In addition, temporal considerations have been recognized in Cole v. United States, 755 F.2d 873 (11th Cir. 1985), tortious conduct was deemed to be temporally removed from the implications of the Feres doctrine inasmuch as the aspects of the tort followed the veteran after discharge. The VBA was considered at 735 F.2d at 879. In Cole, supra, the court said:

> " Because the government's tortious conduct is alleged to have occurred after Cole was discharged, the resulting injury was not 'incident to

> service' since there is no significant potential adverse effect on military discipline and no risk of undesirable and fortuitous applications of state law. There is a sufficient allegation of an analogous state right and the VBA does not preclude a recovery under these circumstances. Accordingly, the district court erred in denying the plaintiffs' motion to amend." (footnotes omitted)

The Court of Appeals for the Third Circuit has adopted the blanket ban. Blanket bans are always being advanced by the Government even in such cases as where the Government has won on other grounds. In Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), the Government contended that the Feres doctrine applies to any service member who at the time of injury or death was generally subject to Article 2 of the Uniform Code of Military Justice (U.S.M.J.), 10 U.S.C. 802. The Woodside

court felt this extended a reading of "incident to service test" too far.

When we put aside the receipt of benefits under the Veterans' Benefit Act or the concept advanced by the U. S. Government in Woodside that a service member who is generally subject to Article 2 of the Uniform Code of Military Justice as a preclusion factor, then we can look at the essential nature of what is remaining, namely a cause of action against a private shipowner who coincidentally is an agency of the U. S. Government, namely the Maritime Administration.

Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981) (en banc, cert. denied, 456 U.S. 972 (1982), has been trumpeted as a bar for suing a civil agency of the U. S. Government if one is a member of the armed services. We

submit that Jaffee, supra, is inapposite. Judge Higginbotham in that case extended the mantle of immunity to named civilians who were at the time deemed by the court exercising in the main military functions and who were truly an arm of the military at the precise time of the offending actions.

We submit that there is a temporal factor in the instant case which undermines the logic of Jaffee and many of the cases dealing with the complications of incident to service.

Temporally, the fault in this case for which plaintiff seeks to hold the Government liable is one that antedates the time of the accident. It was an unseaworthy vessel long before; capable of creating accidents to happen some time in the future.

In sum total, the instant case

deserves case-by-case scrutiny. It involves a Maritime tort not connected with and temporally removed from the date of the accident.

II.

The Feres Doctrine Is Foreign To The Considerations Which Engendered The Public Vessels Act And The Suits In Admiralty Act

While this Court has never passed upon the application of the Feres doctrine to the Public Vessels Act, 46 U.S.C. §781, et seq. and the Suits in Admiralty Act, 46 U.S.C. 741, et seq., other Circuit Courts have. The Third Circuit in the instant case has joined the other Circuits. See Charland v. United States, 615 F.2d, 508, 509 (9th Circ. 1980); Beaucoudray v. United States, 490 F.2d 86 (5th Circ. 1974).

The Second Circuit followed by implication in Cusanelli v. Klaver, 698 F.2d 82 (2d Cir. 1983).

All these cases are based upon Beaucoudray v. United States, supra, which reasons not at all, but assumes that the rationale of Feres should equally apply to the waiver of sovereign immunity implicit in the Suits in Admiralty Act and the Public Vessels Act.

The Suits in Admiralty Act[2] grew out of legislation that had preceeded it, creating the United States Shipping Board in 1916.[3] That statute provided that vessels purchased,

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[2] The Act of March 9, 1920 c 95, 41 stat. 525, 46 U.S.C. §741 et seq.

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[3] The Act of September 7, 1916 c 451, 39 stat. 728, 46 U.S.C. §801 et seq.

chartered or leased from the Board, while employed solely as merchant vessels would be subject to all laws, regulations and liabilities governing merchant vessels whether the United States was interested in them as owner in whole or in part, or held any mortgage lien or other interest in the property. See Norris, The Law of Seaman, Third Edition, at page 220. The 1916 Act, however, was construed to remit seizure of government vessels that were in the merchant service. Lawsuits brought in rem were embarrassing and intolerable.[4]

The Suits in Admiralty Act, which explicitly prohibits the arrest or seizure by jurisdictional process of any

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[4] The Lake Monroe, 250 U.S. 246 L.Ed. 962, 39 S.Ct. 460 (1919). See also: Ryan Stevedoring Co. v. United States, 175 F.2d, 490, 1949 AMC 1363 (CA2 NY 1949), cert den. 338 US 899, 94 L.Ed. 553, 70 S.Ct. 249.

vessel or cargo owned by the United States, gave a litigant the right to sue the United States in personam instead of the right of suit in rem. As Norris points out at page 221 of his text, the intent of the Suits in Admiralty Act was to impose upon the United States the same liability as is imposed by the Admiralty Law on the private shipowner. Liability of the Government in a lawsuit in admiralty had to be predicated upon its acitivity as a shipowner in connection with the vessel.

On the other hand, the Public Vessels Act[5] was designed to provide a remedy against the United States Government for damages arising out of

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[5] Act of March 3, 1925 c 428 43 stat. 112, 46 U.S.C. §781 et seq.

operations of its public vessels. In Olavarria and Co. v. United States, 56 F.Supp. 758, 1944 AMC 1159 (Ala. 1944), the Court said:

> "This Court cannot escape the conclusion that under the Suits in Admiralty Act the sovereign was placed on the same plane with the private operator whenever it entered the business of operating ships in the merchant service. If its agents or operators, through negligence or otherwise, injure its citizens in carrying on such a business, the sovereign assumes the same responsibilities that rest upon its subjects who are engaged in carrying merchandise on the high seas for hire."

Thus the legislative history of the Suits in Admiralty Act and the Public Vessels Act differ sharply from the legislative history of the Federal Tort Claims Act. The right of servicemen to sue was discussed under the Federal Tort Claims Act and a legislative exception was fashioned relating to servicemen

overseas. A judicial exception using the legislative exception as a jumping off place, evolved as the Feres doctrine. On the other hand these two acts relating to suits against the Government in Admiralty, antedated the Federal Tort Claims Act by a substantial number of years. Despite this difference in legislative histories, Charland and Beaucoudray apply the Feres doctrine as a fait accompli. The important discretionary exclusion of the Federal Tort Claims Act is absent[6] in the Suits in Admiralty Act and the Public Vessels Act.

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[6] 28 USC 2680(a). Note also exceptions under 2680(d) which excepts claims cognizable under the Suits in Admiralty Act and Public Vessels Act, 46 U.S.C. 741 et seq. and 781 et seq. and exceptions under 2680(k) claims arising in foreign country. The aforementioned Title 46 statutes are worldwide in scope.

The Suits in Admiralty Act, 46 U.S.C. 741, et seq. was a modification of the prior maritime law inasmuch as it abolished the right to attach and have admiralty courts sell merchant vessel which were owned, possessed or operated by the United States and as a quid pro quo substituted the right to bring libel in personam actions against the United States to enforce asserted claims which before the passage of the Suits in Admiralty Act could have been enforced by seizure and sale, The Bascobal, (5th Cir. 1923), 295 F. 299. The quid pro quo demonstrates that the Suits In Admiralty Act was not a case of a sovereignty deigning to permit itself to be sued. It must be remembered that the maritime law is an integral part of the Constitution having been incorporated in the adoption of the Constitution, Panama Railroad

Company v. Johnson, 264 U.S., 375 (1924). On the other hand, the Federal Tort Claims Act was a designed legislative surrender of sovereign immunity under sharply limited conditions which limitations have been universally deemed to be strictly applied.[7]

No less a legal personage than Judge Learned Hand held in Grillea v. United States, (2d Cir. 1956), 232 F.2d 919, that 46 U.S.C. 741 of the Suits in Admiralty Act under which this lawsuit was brought is not to be construed with the same policy that ordinarily circumscribes the consent of the United States to be sued. Incidentally, the

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[7] Rambo v. United States, (1944, CA5 Ga) 145 F.2d 670, cert den 324 U.S. 848, 89 L.Ed. 1408, 65 S.Ct. 685; Czieslik v. Burnet, (1932, DC NY) 57 F.2d 715, and Miller v. United States, (1932, DC NY) 57 F.2d 889.

Federal Tort Claims Act contains a limitation of fee permitted to be earned by an attorney.[8] The Suits in Admiralty Act and the Public Vessels Act contain no such limitations.

It is respectfully submitted that the Feres doctrine is inapplicable when a corporate agency of the United States is sought to be sued in its role as a shipowner of a cargo carrying vessel as opposed to a war vessel.

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[8] 28 U.S.C. 2678. See also Lane v. United States, 529 F.2d 175, 179 (4th Cir. 1975). "There is no basis upon which we can import the many exceptions in the Tort Claims Act into the suits in Admiralty Act, where the United States is to be held accountable in admiralty whenever a private person in similar circumstances would be."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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Counsel of Record

ADLER AND KOPS
Attorneys for Petitioners

APPENDIX A - OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 23, 1985

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action File No. 85-2675

DONALD L. NEWELL and LEDALIA NEWELL

vs.

THE MARITIME ADMINISTRATION,
THE UNITED STATES OF AMERICA

ORDER

The motion of the defendants for summary judgment is GRANTED.

Judgment is entered in favor of the defendants and against the plaintiff.

IT IS SO ORDERED.

/s/ CHARLES R. WEINER
CHARLES R. WEINER

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action File No. 85-2675

DONALD L. NEWELL and LEDALIA NEWELL

vs.

THE MARITIME ADMINISTRATION,
THE UNITED STATES OF AMERICA

MEMORANDUM OPINION

Plaintiffs, Donald L. Newell and his wife, Ledalia, brought this action under the Public Vessels Act, 46 U.S.C. §781 et. seq. and the Suits in Admiralty Act, 46 U.S.C. §741 et. seq. against defendants The Maritime Administration and The United States of America for damages for injuries sustained by Donald Newell on May 14, 1983 aboard the SS SCAN while it was docked at the Philadelphia, Pennsylvania Navy Yard. Presently before the court is defendants' motion for

APPENDIX A

summary judgment. For the reasons which follow, the motion is granted.

The parties stipulated to the following facts: Plaintiff was injured on May 14, 1983 while aboard the SS SCAN, a vessel docked at the Philadelphia Navy Yard. On that day, plaintiff, pursuant to temporary duty orders, was assigned to inactive training duty as a member of the United States Naval Reserve, BM1. On the day of plaintiff's injury, the SS SCAN was being used by the Chief of Naval Reserve as a training facility, pursuant to a Memorandum of Understanding between the Chief of Naval Reserve and the Maritime Administration. On May 14, 1983 the SS SCAN was owned by the Maritime Administration. At the time of his injury, plaintiff was under the command of naval officers in charge of the SS

SCAN. After his injury, plaintiff was taken to the Navy Regional Medical Center of Philadelphia, a military hospital, where he received treatment for his injuries. Plaintiff subsequently applied for and received disability benefits from the Naval Reserve Department as a result of the injuries he sustained on May 14, 1983.

In support of its motion for summary judgment, defendants argue that plaintiff's claim is barred under the Feres doctrine. In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court created an exception to the government's general consent to suit in the Federal Tort Claims Act, holding that the government is not liable for injuries to servicemen "where the injuries arise out of or are in the course of activity

incident to service." 340 U.S. at 146. The court advanced three reasons for limiting the scope of the Federal Tort Claims Act. First, as it is the rationale of the Act that the United States incur liability paralleling that of a private citizen in the same circumstances, and no American law has ever permitted a serviceman's recovery against superior officers or the government, it could not have been the intent of Congress to impose liability for negligence where before there was one. Second, the relationship of military personnel and the government is uniquely federal and should not be intruded upon by claims based on local tort law. Third, Congress has enacted generous death and disability benefits for members of the armed forces and their

families. 340 U.S. at 141-145. In addition, it has been recognized that the doctrine also limits the Government's waiver of its sovereign immunity in admiralty jurisdiction under the Public Vessels Act, 46 U.S.C. §§781-89, and the Suits in Admiralty Act, 46 U.S.C. §741. Charland v. United States, 615 F.2d 508, 509 (9th Cir. 1980); Beaucoudray v. United States, 490 F.2d 86 (5th Cir. 1974). We elect to follow the language of the Ninth Circuit in Charland which stated "the rationale supporting the ruling in Feres limiting the waiver of sovereign immunity applies with equal force in the context of governmental liability in admiralty." 615 F.2d at 509. It has also been held that the bar to liability imposed by Feres applies with equal force to reservists. Stencel

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Aero Engineering Corp. v. United States, 431 U.S. 666, 673 (1978); Anderson v. United States, 724 F.2d 608, 610 (8th Cir. 1983); United States v. Carroll, 369 F.2d 618, 620 (8th Cir. 1966). Finally, the Supreme Court in Stencel, 431 U.S. at 669, described the service immunity as applying to service injuries occurring at the hands of "Government officials," not simply military officials. The Court of Appeals for the Third Circuit, noting the Stencel decision, has ruled that the principles announced in Feres apply equally to civilian defendants. Jaffee v. United States, 663 F.2d 1226, 1238 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982).

In the case sub judice, plaintiff has admitted that his injury occurred in the course of activity incident to

service (Plaintiff's Memorandum at p. 2). There is no doubt that plaintiff's status at the time of injury was that of a United States Naval Reservist who was under the command of naval officers in charge of the SS SCAN (Stipulation, at ¶¶2, 3). Plaintiff's action was brought under the Public Vessels Act and the Suits in Admiralty Act, both to which the Feres doctrine applies. Finally, plaintiff has already received disability benefits from the Naval Reserve Department as compensation for his injuries (Stipulation, at ¶5), which is exactly one of the aforementioned rationales the Supreme Court set forth in Feres for limiting the scope of the Federal Tort Claims Act. The same rationale applies in the context of governmental liability in admiralty where

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a plaintiff has received disability benefits from the Naval Reserve Department. Thus, we conclude that plaintiff's claim against the Maritime Administration and the United States is barred by the Feres doctrine.

Plaintiff directs our attention to Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985), for the proposition that the Feres doctrine does not apply when the defendant is a civilian agency. However, the Johnson decision is no longer the law of the Eleventh Circuit. The Johnson decision has been vacated pending en banc review initiated on sua sponte reconsideration by the Court. Johnson v. United States, 760 F.2d 244 (11th Cir. 1985).

Since we are satisfied that there exists no genuine issue as to any

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material fact, defendants are entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Majors Furniture Mart, Inc. v. Castle Credit Corp., Inc., 602 F.2d 538, 539 (3d Cir. 1979).

/s/ CHARLES R. WEINER
CHARLES R. WEINER

APPENDIX B - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1114

NEWELL, DONALD L. AND NEWELL, LEDALIA, HIS WIFE,

Appellants

vs.

THE MARITIME ADMINISTRATION, THE UNITED STATES OF AMERICA

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 85-2675) District Judge: Honorable Charles R. Weiner

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Submitted Under Third Circuit Rule 12(6) September 12, 1986

Before ALDISERT, Chief Judge, and HIGGINBOTHAM and HUNTER, Circuit Judges (Filed September 15, 1986)

MEMORANDUM OPINION OF THE COURT

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Avram G. Adler (Adler and Kops) for Appellant; Robert S. Greenspan, Esquire and Nicholas S. Zeppos, Esquire (U. S. Department of Justice) for Appellee.

ALDISERT, Chief Judge:

In Feres v. United States, 340 U.S. 135 (1950), the Court held that "the Government is not liable . . . for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146. In Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981) (in banc), cert. denied, 456 U.S. 972 (1982), we held that the Feres doctrine applies to claims based on the actions of civilian employees of the federal government involved in the activities incident to military service. In this appeal from an adverse summary judgment in favor of the

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United States by an injured Naval Reservist, we are to decide whether the Feres doctrine applies to an action brought under the Public Vessels Act, 46 U.S.C. §781, et seq., and the Suits in Admiralty Act, 46 U.S.C. §741, et seq., against the defendants, the Maritime Administration and the United States of America, for damages sustained by Donald L. Newell aboard the SS SCAN while it was docked at the Philadelphia Navy Yard.

The parties stipulated as to the following facts; plaintiff was injured while aboard the SS SCAN, his injury occurred during the course of training duty as a member of the United States Naval Reserve; at the time of his injury he was under the command of Navy officers in charge of the SS SCAN. App. at 42a-43a. Throughout the litigation

appellant has conceded that his injury arose out of activity incident to military service. Id. at 45a.

The Feres doctrine holds that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of, activity incident to service. 340 U.S. at 146. That the Court in Feres did not confine its ruling to the negligence of fellow servicemembers was made clear in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977). There, in holding that a private contractor who paid damages to a serviceman may not sue the United States for indemnity, the Court reaffirmed that "[i]n Feres v. United States . . . the Court held that an on-duty serviceman who is injured due to

the negligence of Government officials may not recover against the United States under the Federal Tort Claims Act.," id. at 669 (emphasis added); see also id. at 673, "at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety" (emphasis added).

Against this background this court in Jaffee v. United States squarely held that Feres applies where the servicemember is injured by the actions of civilian employees of the federal government involved in activities incident to military service. In Jaffee a former serviceman and his wife sued for injuries allegedly arising from the serviceman's exposure to radiation while he was a member of the United States

Army. 663 F.2d at 1229. The Jaffees based their claims on the actions of both Army officials and civilian employees of the federal government. Plaintiffs argued that even if the military officials were immune under Feres, the civilian employees were not. In rejecting this argument this court held: "The difficulty with [plaintiffs'] argument is that the Court in Stencel ... described the service immunity as applying to service injuries occurring at the hands of 'Government officials,' not simply military officials." Id. at 1238 (citations omitted).

The court's holding in Jaffee directly controls this case. Plaintiff concededly was injured in the course of activity incident to his military service. He seeks to circumvent Feres by

pleading the negligence of the Maritime Administration -- a civilian agency of the federal government involved in military activities in acquiring, outfitting, and maintaining, in conjunction with the Navy, ships for the Ready Reserve Force. Under Jaffee, plaintiff's attempt to evade Feres by basing his complaint on the actions of civilian employees involved in these activities incident to service must be rejected.

This court's ruling in Jaffee is in accord with the overwhelming weight of authority. Other courts of appeals have repeatedly and consistently applied Feres to bar an action by a servicemember injured by the negligence of civilian employees of the federal government. See Warner v. United States, 720 F.2d 837,

839 (5th Cir. 1983) (per curiam); Carter v. Cheyenne, 649 F.2d 827, 830 (10th Cir. 1981); Woodside v. United States, 606 F.2d 134, 142 (6th Cir. 1979), cert. denied, 445 U.S. 942 (1980); Uptegrove v. United States, 600 F.2d 1248, 1251 (9th Cir. 1979), cert. denied, 444 U.S. 1044 (1980); Hass v. United States, 518 F.2d 1138, 1142 (4th Cir. 1975); Certain Underwriters at Lloyd's v. United States, 511 F.2d 159, 163 (5th Cir. 1975); Bankston v. United States, 480 F.2d 495, 497 (5th Cir. 1973); United States v. Lee, 400 F.2d 558, 562 (9th Cir. 1968), cert. denied, 393 U.S. 1053 (1969); United Air Lines, Inc. v. Wiener, 335 F.2d 379, 404 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964); Layne v. United States, 295 F.2d 433 (7th Cir. 1961), cert. denied, 368 U.S. 990 (1962);

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Watkins v. United States, 462 F. Supp. 980, 985 (S.D. Ga. 1977), aff'd, 587 F.2d 279 (5th Cir. 1979) (per curiam).

This court's holding in Jaffee -- that Feres applies to claims based on the actions of civilian employees of the federal government involved in activities incident to military service -- was based on the very nature of military activities. As we recognized in Jaffee, 663 F.2d at 1238, and as this case shows, when military actions are taken or military operations carried out, the United States government acts as an entity, often relying upon and drawing from its civilian agencies for personnel, equipment, technological assistance, or intelligence reports. As plaintiff has acknowledged, the Maritime Administration maintains the SS Scan "for reasons of ...

national defense." Br. for appellant at 13; see also app. at 17a, 28a. And in carrying out this national defense activity, it is clear that the Maritime Administration, in conjunction with the Navy, is called upon to play crucial military functions. App. at 17a-20a, 28a-29a. Thus, this case, and all of the cases cited, are testament to the wide range of military activities that necessarily require civilian participation, including weapons research and testing, see Jaffee, 663 F.2d at 1238, medical care and treatment, see Certain Underwriters at Lloyd's, 511 F.2d at 160, intelligence activities, see Sigler v. LeVan, 485 F.Supp. 185 (D.Md. 1980), and recreational activities, see Hass, 518 F.2d at 1142. Therefore, the rule in Feres cannot be artificially

limited to cover only military personnel, but as this court held in Jaffee, must also include those civilians who are necessarily involved in activities incident to military service.

Therefore, we find that the district court correctly applied Feres and held the United States immune to Newell's claims under the Public Vessels Act, 46 U.S.C. §781, et seq. and claims under the Suits in Admiralty Act, 46 U.S.C. §741, et seq. since his injuries arose from his actions incident to military service. We must reverse the trial court's granting of summary judgment, however, because, having found that Feres applied, the trial court should have dismissed the case for lack of subject matter jurisdiction. Our analysis is based on Stanley v. Central Intelligence Agency,

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639 F.2d 1146 (5th Cir. 1981), which squarely addressed this issue.

In Stanley, a former army master sergeant brought suit against the United States to recover for injuries allegedly sustained as a result of the United States' negligent administration of a chemical warfare experimentation program in which he participated. The trial court's judgment that Feres barred the suit was upheld since the sergeant volunteered to participate in the program in lieu of his regular duties and the experiment was conducted on an Army base for the sole benefit of the Army. The trial court's grant of summary judgment in the case, however, was reversed. The Fifth Circuit noted "'[t]he United States, as sovereign, is immune from suit save as it consents to be sued..., and

the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." Stanley, at 1156 (citations omitted). The court went on to note "[w]here no such consent exists, a district court has no jurisdiction to entertain a suit against the United States." Id. (citation omitted). As courts have consistently held, the Feres doctrine is a judicial conclusion that the government does not consent to suit for injuries sustained by a service member incident to that member's military service. As a consequence, federal courts have no subject matter jurisdiction to hear cases in which such injury is sustained and in such cases must fulfill their mandatory duty to dismiss suits over which they have no jurisdiction, see Marshall v.

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Gibson's Products, Inc. of Plano, 584 F.2d 668, 671 (5th Cir. 1978), rather than adjudicate the merits of such claims. "Since the granting of summary judgment is a disposition on the merits of the case, a motion for summary judgment is not the appropriate procedure for raising the defense of lack of subject matter jurisdiction." Stanley, at 1157 (citations omitted). Such defenses should therefore be raised by a motion to dismiss for lack of subject matter jurisdiction rather than a motion for summary judgment. Id.; Rayner v. United States, 760 F.2d 1217 (11th Cir. 1985). Accordingly, Newell's complaint should have been dismissed rather than disposed of via summary judgment.

Although we approve the district court's determination that the appellant

could not prevail on his complaint, we will vacate the order granting summary judgment and remand the proceeding with a direction that the complaint be dismissed.

TO THE CLERK:

Please file the foregoing opinion.

/s/ ALDISERT
Chief Judge